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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1974

NO. 74-1067

PAUL K. SCHUBERT, and All Others Similarly Situated,

Petitioners,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, a/k/a NCAA, and BALL STATE UNIVERSITY (Legal Name--Trustees of Ball State University),

Respondents.

PETITION FOR WRIT OF CERTIORARI

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IN THE

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October Term 1974

No. _____

PAUL K. SCHUBERT, and All Others Similarly Situated,

Plaintiff-Appellant,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, a/k/a NCAA, and BALL STATE UNIVERSITY (Legal Name - Trustees of Ball State University),

Defendant-Appellees.

PETITION FOR WRIT OF CERTIORARI

Opinion Below

The Order of the United States Court of Appeals for the Seventh Circuit is unreported, but the Order is set out in Appendix A hereto.

Jurisdiction of the Court

The Order of the United States Court of Appeals for the Seventh Circuit was entered on October 22, 1974, and a Motion to Reconsider and Suggestion of En Banc Hearing was denied on November 27, 1974. This

Petition for Writ of Certiorari is being filed within ninety (90) days of the Order of November 27, 1974. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

Question Presented

Whether the United States Court of Appeals for the Seventh Circuit erred in upholding the April 3, 1974, Order of the United States District Court for the Southern District of Indiana in which the District Court failed to rule that the NCAA 2.00 "non-predictor" rule creates a classification scheme which violates the equal protection clause of the United States Constitution.

Regulation Involved

The NCAA Eligibility Rule, By-Law 4-6 (b), in relevant part as follows:

> "(b) A member institution shall not be eligible to enter a team or individual competitors in an NCAA-sponsored meet or tournament unless the institution in the conduct of all of its intercollegiate programs:
>
> > "(1) Limits its scholarship or grant-in-aid awards (for which the recipient's athletic ability is considered in any degree), and eligibility for participation in athletics or in organized athletic practice sessions during the first year in residence, to student-athletes who have graduated from high school with a minimum grade point average of 2.000 (based on a maximum of 4.000) for all work taken. . ."

Statement of the Case

On March 15, 1974, plaintiff Paul K. Schubert, filed a Complaint for Permanent Injunction, Declaratory Judgment, and Damages as well as a Motion for Temporary Restraining Order against the National Collegiate Athletic Association (hereinafter referred to as the NCAA) and Ball State University in the United States District Court for the Southern District of Indiana, Indianapolis Division. The Complaint challenged the NCAA eligibility rule (By-Law 4-6(b)) on its face and as applied to plaintiff, in that the rule violates the equal protection of law granted by the United States Constitution by setting up an unreasonable classification scheme that discriminates against plaintiff. On March 28, 1974, defendant NCAA filed an appearance, and a hearing was held on the preliminary injunction. On April 3, 1974, Findings of Fact, Conclusions of Law and Order on Plaintiff's Request for Temporary Injunction were submitted to the Court and the Court decreed that the request for a preliminary injunction be denied. The Court held inter alia that the non predictor rule was reasonable. On that same date Notice of Appeal Under Section 38 USC 1292(a) to the United States Court of Appeals for the Seventh Circuit was filed with the District Court. Coterminously, plaintiff filed his brief in the Seventh Circuit and a request for an expedited hearing. On April 8, 1974, defendant NCAA filed its answer to the complaint and on April 16, defendant Ball State filed its Answer following the filing of an Appearance by counsel for Ball State. Defendant Appellee NCAA mailed its "Response in

Opposition to Appellant's Motion for Expedited Hearing or in the Alternative for Summary Reversal" for filing on April 18, 1974, in which they pointed out that the District Court had found that Paul Schubert had not established any irreparable damage which would be sustained if a temporary injunction were denied. In addition, it was stated therein that the constitutional arguments were rejected by the U.S. Court of Appeals for the Ninth Circuit in Associated Students, Inc. of California State University--Sacramento v. National Collegiate Athletic Assoc. (No. 73-2278, decided March 14, 1974). Plaintiff suffered the ill fortune to have his controlling authority overruled without his knowledge the day before he filed his complaint.

On April 30, 1974, the United States District Court for the Southern District of Indiana, Indianapolis Division stipulated that, "The evidence presented at the hearing held on March 28, 1974, on plaintiff Schubert's application for a temporary restraining order herein shall constitute all the evidence in this action," and that the Court's order on the Request for Temporary Injunction should constitute a final entry and order dismissing the action at plaintiff's costs. Therefore, the appeal to the Court of Appeals of the Seventh Circuit was to be continued as an appeal from such final order.

The Brief of Appellant was filed by plaintiff's counsel in the Court of Appeals for the Seventh Circuit on April 12, 1974, and Defendants-Appellees' Brief was filed in the Seventh Circuit on May 11, 1974. Oral Argument was held on September 20,

1974, and the Order of the Court of Appeals (appended hereto as Appendix A) was entered on October 22.

On November 5, 1974, plaintiff filed a "Motion to Reconsider and Suggestion of En Banc Hearing" which stated that decision of the case by Order rather than judicial opinion resulted in it being unreported and of limited precedential value, and said Motion requested an en banc hearing. The Motion to Reconsider was denied by the Court of Appeals on November 27, 1974.

Reason For Granting the Writ

Plaintiff's contention is that the United States Court of Appeals for the Seventh Circuit erred in upholding the District Court's ruling in this case. The Court of Appeals correctly stated in its order of October 22 that the legal issue to be resolved in this case is "whether the 2.000 rule bears a reasonable relationship to a permissibable purpose"as is required in civil rights casesaccording to the Supreme Court in Reed v. Reed, 404 U.S. 71 (1971). Plaintiff contends both that the rule does not have a permissable purpose and that, even if the purpose is accepted, the rule does not bear a "reasonable relationship" to that purpose.

The Order stated that the first purpose of the rule according to the NCAA was "to discourage the recruitment and exploitation of young athletes who are most likely to be unable to meet the academic requirements for retention and graduation." (emphasis added). In plaintiff's opinion there are two major errors of reasoning in accepting

the above purpose. First of all, a student's chances for involvement in college athletics during his freshman year should not be cancelled merely because a governing body feels that the colleges need to be controlled in their exploitation of young athletes. College is a fresh start, and if the athlete has proven himself academically in college, as Paul had during the fall and winter semesters, there is no justification for requiring a B athlete to sit on the sidelines while C students who fared better in high school are allowed to play. Why punish good athletes, such as Paul Schubert, who are willing to pay their way through school and to work hard in order to get an education and to enjoy the honor of participating in sports, rather than punishing an overzealous athletic department at a college or university? If the NCAA wants to control the recruitment and exploitation of college athletes, it should make regulations controlling this directly, such as passing a limitation on the amount of scholarship and fringe benefits that can be offered along with rules concerning the academic standing of the student receipients.

The 2.0 rule with its elimination of student participation is not a fair method for the control of this prevalent problem. In addition, the rule is ineffective as far as solving the problem, and therefore, bears no "reasonable relationship" to the purpose stated. The recruitment continues, with non-intellectual students being shoved into the most basic and the easiest courses, grade records being changed, and huge sums of money and "fringe benefits" being offered to athletically talented prospective students. The abuses of

athletic recruitment are legion and the 2.00 non-predictor rule only furthers the hypocrisy.

Many news articles attest to the fact that if an overzealous athletic department wants a freshman athlete badly enough, recruitment will continue as usual. Obversely, it is the hard-working, honest students such as plaintiff who are negatively affected by a rule which bears little relationship to any permissable purpose.

The second stated purpose of the rule also lacks appropriateness to the case at bar and does not comport with equal protection of the laws. The whole concept of predicting what someone will do in college based on prior performance, accepting his enrollment and thereafter denying him basic college activities on that prediction is the antithesis of the American way and is violative of any kind of democratic process. The fundamental principle should be that, if the university is willing to accept a student, it should be willing to give him the full program including athletics, until qualification is revoked by academic failure. To deny a student participation in sports without a chance to prove himself academically is contrary to American concepts of ordered liberty.

At the case at bar, it is even more severe since the plaintiff had the opportunity at the time of the filing of his complaint to prove his ability to maintain over a 2.0 average during his first two quarters of college work, yet was denied the opportunity for a hearing to prove that he was not one of those "most likely

to be unable to meet the academic requirements for retention and graduation." Therefore, any rule based on predictability (such as the 2.000 eligibility rule as stated in the Order) is an unreasonable violation of due process as well as a violation of the equal protection of the laws under the Fourteenth Amendment.

The second purpose listed in the order was that "the rule would foster an image of the college athlete as one committed to scholastic achievement." This lofty statement simply puts a cosmetic gloss over the facts of the real world. The exceptional college athlete, in most instances, is a mercenary marking time until he joins the ranks of the professionals. For the NCAA to pretend otherwise is delusional. In actuality it is extremely doubtful whether this rule aids in "committ(ing) a student to academic achievements." It is common knowledge of psychology and human nature that a person will exert himself more fully to attain a major goal (i.e. getting a grade which will allow him to play tennis) than under ordinary circumstances. However, it is also common sense that it is much easier to work for a goal that is close at hand or within sight at all times (i.e. practicing with and/or playing on the team while working hard scholastically to retain the privilege), rather than working for a distant goal which seems almost unattainable (i.e. working hard academically without sports activity in the hope of making the team next year). The depressing effect the latter can have on an individual who considers a sport a crucial part of his life and development is best expressed by plaintiff Paul Schubert's own words taken

from the transcript of the District Court hearing:

> "When I first came to college I wanted to prove to myself, academically, that I was capable. I went to school for an education, and tennis secondarily. But a lot of my friends that I knew from Indianapolis and around the State that I play tennis with were out playing--and my first quarter I just put it out of my mind and hit my grades, but during the winter--because you have to practice all year round, practice indoors--all my friends would be playing, and I'd have to go play basketball for physical education to keep in shape. Since I can't play tennis, I have to have some means of physical exertion, and I played basketball when the guys down there were playing tennis. And it got really depressing to see others playing tennis--a sport I have played all my life, and I am capable of being on the team--and then have to go upstairs and play basketball. It didn't make any sense. It was arbitrary." (Transcript pages 17-18).

It is well-known fact among guidance counselors at colleges and universities that the changes in a student's life during a normal freshman year in college can lead to disorientation and depression which can consequently affect academic standing. The arbitrariness of the rule coupled with the sense of injustice it promotes in the mind of the benched athlete may cause a student's grades to drop even further, rather than having the salubrious effect of committing the student to academic

achievement.

Furthermore, the rule precludes plaintiff from even practicing with the team. Plaintiff was forced to travel from Muncie to Indianapolis to maintain his competitive skills. The travel time cut into his study time.

The final purpose of the rule mentioned in the Appellate Order was based on the belief that "a freshman college student who had academic difficulties in high school should devote full time to his studies." While this purpose seems laudable at a glance, the challenged eligibility rule does not lend itself to fulfillment of its stated objective. Athletic ability is not something that can be maintained through stagnation, but is rather a skill which must be constantly sharpened against qualified competition. Unless a student is willing to end his competitive athletic endeavors for the duration of his college career, he must keep his skills toned at a competitive level in order to "make the team" his sophomore year. Consequently, most students with the desire and the ability to join organized sports who are prohibited from so doing because of academic standing will consider it essential to find a way to practice--often having to go out of the way to practice.

In the case at hand, since plaintiff was not allowed to practice with team members, he felt forced to travel to Indianapolis, some seventy miles away from Ball State University in Muncie, in order to match his tennis skills with those on a level equivalent to his. In so doing, he used up precious time which could have been devoted to his studies. In between trips

he played basketball as a "means of physical exertion" as he stated in the above excerpt from the transcript.

Therefore, it does not follow that avid sports participants are aided in finding time for study by the eligibility rule. On the contrary, in plaintiff's case the long trips to Indianapolis increased the time necessary for maintaining his ability and, therefore, hindered his study efforts. It is doubtful whether this loss of time in compensating for the lack of organized practice is an isolated case. Therefore, the rule does not bear a reasonable relationship to the third and final purpose mentioned in that its enforcement does not affoed an athlete full time for his studies.

We believe that this Court, having read the point-by-point objections to the "reasonable relationship" of the 2.00 eligibility rule to the purposes listed, will find that these relationships are "clearly erroneous" and will vote to consider the revision or elimination of this discriminatory rule.

Although the weight of legal precedence is against plaintiff in this case, counsel is confident that this Court will grant certiorari and will realize that there is a pressing need to rule on the fairness of the 2.00 rule. The important affect of this rule upon numerous college athletes cannot be overlooked. The hardship of the rule on minority athletes is also worthy of scrutiny. Enclosed as Appendix "B" is a copy of the recent article by Roy Wilkins pointing to the pernicious effects of the rule on minority athletes.

Plaintiff agrees with the District

Court in its decision of the Associated Students, Inc. case in California and believes it was right on target with the following quotation:

> "The opportunity to participate in intercollegiate athletics is a fleeting one. The student can compete for a maximum of only four years and then his college athletic career is ended. During those four brief years the athlete is afforded the opportunity to compete and work with others, to gain confidence in himself, and to mature emotionally and physically. It also cannot be overlooked that many college athletes lay the foundation for rewarding professional athletic careers during the four years of intercollegiate competition. In this day and age of professional sports, olympic games, and the like, it cannot be denied that the college athletics can be of the utmost importance to many student athletes."

This physical and emotional development should not be denied to a freshmen athlete who is willing to work hard to obtain and maintain this privilege--especially after he has proven his ability to be successful academically. The 2.00 eligibility rule does not stand up to the reasonable relationship requirement and should be reviewed and questioned by this Court as to its unfair affect on plaintiff-petitioner, Paul Schubert, as well as the class of non-predictor athletes.

CONCLUSION

For the foregoing reasons, it is respectfully prayed that a Writ of Certorari be granted to review the judgment of the United States Court of Appeals for the Seventh Circuit.

PROOF OF SERVICE

STATE OF INDIANA, COUNTY OF MARION SS:

I hereby certify that I have served upon all counsel of record a copy of the foregoing document by United States Mail, postage prepaid, first class this 24th day of February, 1975.

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UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
(ARGUED SEPTEMBER 20, 1974)
OCTOBER 22, 1974

Before

Hon. LATHAM CASTLE, Senior Circuit Judge
Hon. THOMAS E. FAIRCHILD, Circuit Judge
Hon. ROBERT A. SPRECHER, Circuit Judge

PAUL K. SCHUBERT, and All Others Similarly Situated, Plaintiffs-Appellants, No. 74-1282 vs. NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, a/k/a NCAA, and BALL STATE UNIVERSITY (Legal Name-Trustees of Ball State University), Defendants-Appellees.	) Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division No. IP 72-149-C S. HUGH DILLIN, Judge.

ORDER

Plaintiff is an avid tennis player and a student at Ball State University. Ball State is a member of the National Collegiate Athletic Association (NCAA) and subscribes to NCAA By-Law 4-6-(b), the 2.000 rule, which provides:

> "(b) A member institution shall not be eligible to enter a team or individual competitors in an NCAA-sponsored meet or tournament unless the institution in the conduct of all its intercollegiate programs:
>
> (1) Limits its scholarship or grant-

> in-aid awards (for which the recepient's athletic ability is considered in any degree), and eligibility for participation in athletics or in organized athletic practice sessions during the first year in residence, to student-athletes who have graduated from high school with a minimum grade point average of 2.000 (based on a maximum of 4.000) for all work taken...."

Plaintiff graduated from high school with below a 2.000 grade average and was declared ineligible under the 2.000 rule to play on the Ball State tennis team during his freshman year. In the first quarter of his freshman year at Ball State, plaintiff had an average of 3.2; in the second quarter 1.8; averaging the two quarters, 2.45.

Plaintiff filed suit against Ball State and the NCAA under 42 U.S.C. § 1983 seeking a declaratory judgment declaring the 2.000 rule unconstitutional, an injunction barring enforcement of the rule, and compensatory and punitive damages. Upon plaintiff's motion for a preliminary injunction a hearing was held. When the preliminary injunction was denied, the parties stipulated that the hearing record constituted the entire evidence in the case. The District Court entered a final order dismissing the action, and plaintiff appealed. We affirm.

Plaintiff's cause of action raises several jurisdictional issues. First, jurisdiction is alleged to rest on 28 U.S.C. § 1343. It is at least doubtful, however, whether Ball State University is a "person" within the meaning of 42 U.S.C. § 1983

and therefore whether 28 U.S.C. § 1343 provides a basis for federal jurisdiction. See City of Kenosha v. Bruno, 412 U.S. 507 (1973); Monroe v. Pape, 365 U.S. 167 (1961).

There is also a serious question whether the plaintiff has a cause of action against the defendant NCAA. To find for the plaintiff against the NCAA it is necessary to conclude that the activities of the NCAA constitute state action for the purpose of § 1983 and the fourteenth amendment, as held in Associated Students, Inc.,etc. v. National Co. Ath. Assn., 493 F.2d 1251, 1254 (9th Cir., 1974).

We need not, however, resolve definitively these threshold issus for it is clear that plaintiff's cause of action has no merit. Plaintiff's claim is grounded on the equal protection clause of the fourteenth amendment, and the parties agree that the legal issue to be resolved is whether the 2.000 rule bears a reasonable relationship to a permissible purpose.

The defendants advance several concerns that prompted adoption of the rule. First, the rule was adopted to discourage the recruitment and exploitation of young athletes who are most likely to be unable to meet the academic requirements for retention and graduation. It was also thought that the rule would foster an image of the college athlete as one committed to scholastic achievement. Finally, the rule was adopted in recognition of the fact that a freshman college student who had academic difficulties in high school should devote full time to his studies. We agree with the District Court that these purposes are legitimate and the rule reasonably related to

them.

The plaintiff argues, nevertheless, that the purposes of the rule are not served when the rule is applied to a student such as the plaintiff who has demonstrated competence in the college classroom in the first two quarters of the college year, but is barred from competing in a sport in the third quarter, which is its normal season. This, however, is no more than an arguably inequitable application of a necessarily generalized rule to a particular fact situation. See Associated Students, supra, p.1256.

The Clerk of this Court is directed to enter judgment affirming the order appealed from.

THE INDIANAPOLIS STAR

Roy Wilkins

Athletes And Their Grades

Two black basketball players, Glenn Mosley of Seton Hall and Bernard King of the University of Tennessee, are the latest Negro players to experience some questioning of their marks in precollege days. King, after a one-game suspension while his record was being probed, was reinstated and will be eligible to play out the schedule.

Wilkins

These troubles over marks they received as long ago as the ninth grade have been a menace to the careers of many fine black athletes. The intense recruiting of the young athletes is responsible for much of the woe. Some of the trouble can be traced to the colleges.

BUT SOME OF IT is the direct result of the actions of the students themselves.

They are not to be blamed, except for signing a paper that doesn't say anything except that the student shall play the game and somewhere along the line he will receive an athletic scholarship of so much a year. Black students are just as weak and unthinking as white ones. They are intent upon reaching the place where they can earn and spend the big money. They have read of Walt Frazier's wardrobe or of Wilt Chamberlain's Rolls Royce. They want to be there, too.

Of course, such a young athlete understands that he is just getting on the lower rung of the ladder. If he gets this scholarship he will make a reputation as a basketball

player, and, hopefully, attract the attention of a scout for a professional team. He will start at the minimum salary unless he gets the breaks and a bonus and-or one of those fabulous money contracts.

WHERE ELSE can a young black man earn $30,000 to $100,000 to $250,000 (in some cases) before he is 40 years old?

Some years ago a tear-jerking publication had a lot to say about the black football players at a Midwestern university. It seems that the black players had little except their contracts (and scholarships) to play football. No one paid any attention to them after the football season. Nor, for that matter, during the season. They had to be there for practice sessions and at game time. Some boys never received an education and some, it was discovered, had below-average marks back into their high school days.

In the recent King case, the University of Tennessee sent three men to check the marks of Bernard King, a graduate of Fort Hamilton High School in Brooklyn. They checked every mark, including the ninth grade and all high school years. As a result, King's marks were found to have been lower, not higher, than actually reported. If someone was trying to push King into the University of Tennessee, he did not do a plausible job.

KING HAD a C-minus average. His grade was 69.2 and as a result of the check, it was raised to 70. The final figure was not overwhelming, but at least it was respectable.

It should be remembered that in the race to uncover the pot of gold for the black athletes, there are no shortcuts. There is nothing to compare to digging up your grades in the ninth grade, adding them up to 69.2, and requiring a special examination of the marks to bring it up eight-tenths of one per cent to 70. A future should never hang by .8 of a per cent, and athletes should see that it doesn't happen.

(Register and Tribune Syndicate)